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In The

Supreme Court of the United States

October Term, 1975

No. 75-868

THE BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA,
Petitioner,

vs.

A. NEIL DAWES AND ALL EXTENSION EMPLOYEES OF THE UNIVERSITY OF NEBRASKA COLLEGE OF AGRICULTURE WHO ARE SIMILARLY SITUATED,
Respondent.

BRIEF OF RESPONDENT TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Respondent.

BRIEF OF RESPONDENT TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The respondent male class is representative of all male extension employees of the University of Nebraska College of Agriculture whose compensation was less for the 1972-73 fiscal year as the result of the University applying a salary formula only to female employees of the Colleges of Agriculture and Home Economics, and failing to apply the same salary formula to the respondent class of males. The respondent respectfully prays that the Petition sought by the Petitioner herein be denied.

OPINION BELOW

The Opinion of the Court of Appeals for the Eighth Circuit, not yet reported, appears in the Appendix hereto at App. 1-App. 10 (Appendix Exhibit A). The Opinion of the District Court for the District of Nebraska, not reported, appears in the Appendix hereto, at App. 11-App. 31 (Appendix Exhibit B).

———o———

JURISDICTION

The Respondent agrees with the Petitioner's Jurisdictional Statement appearing on page 2 of Petitioner's Petition. The Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254 (1).

———o———

QUESTION PRESENTED

Whether the University of Nebraska discriminated on the basis of sex against male employees of the College of Agriculture and Home Economics when, while seeking to equalize salaries paid to male and female employees, it established a formula for determining minimum salaries of female employees, but refused to use the same formula for determining the minimum salaries of male employees.

———o———

STATUTORY PROVISION INVOLVED

United States Code, Title 29:

§206 (d)(1). Minimum Wage

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

———o———

STATEMENT OF THE CASE

The Respondent agrees with the concise statement of Judge Heaney of the Court of Appeals for the Eighth Circuit setting forth the pertinent facts of this case and the

history of the case to this point. Prior to quoting from Judge Heaney's opinion, it should be noted that the suit arose as a declaratory judgment action by the Board of Regents of the University of Nebraska (hereafter University) wherein a determination was sought under the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) of the rights and status of the parties.

The defendant class (hereafter Respondent) counterclaimed seeking recovery for unpaid wages, liquidated damages, interest and reasonable attorneys fees. The University denied the Respondent's counterclaim and pled the defense of sovereign immunity under the Eleventh Amendment.

Judge Heaney's statement of the case follows:

"In the spring of 1972, the University became aware of the problems encountered by the University of Wisconsin when it was investigated and found in violation of the Civil Rights Act of 1964. The University of Wisconsin was found to have unlawfully discriminated against women in setting salaries when it underwent a compliance review conducted by the United States Department of Health, Education and Welfare. The University, to avoid similar problems, determined to undertake a review of its salary structure and make such adjustments as necessary to eliminate salary discrimination based on sex in order to avoid the possible loss of federal funds. Directives were sent through administrative channels until they reached the Deans of the Colleges of Agriculture and Home Economics. These colleges referred the matter to a joint committee for study.

"The committee, after intensive study, concluded that they could best determine whether inequities existed through a three-step process: first, identify comparable jobs; second, examine the salaries of the males and identify and assign a monetary value to the factors which went into determining their salaries; and third, compare the average male salary with individual female salaries based on a formula developed through the first two steps of the process.

"In identifying comparable jobs, the committee decided that exact one-to-one comparisons were impractical. They determined that they could classify the employees according to whether they were Academic Research and Extension Specialist Staff or Extension Field Staff; *i. e.*, Specialist Staff or Field Staff.

"In the second step, the committee determined that education, specialization, years of direct and related experience and merit were the factors which logically determined a male professional's salary. In order to assign a monetary value to these factors, the committee made a determination that Doctors of Philosophy with no experience were being hired at $14,000. Of that $14,000, $8,000 represented the value of a Bachelor's degree $2,000 represented the value of a Master's degree, $3,000 represented the value of a Doctor's degree and $1,000 represented the value of specialization.[2] The portion of salary

---

2 All Ph.D.'s were credited with $1,000 for specialization. The committee also credited personnel holding the position of County Agent Chairmen in the Field Extension Staff category with $1,000 for specialization although such personnel did not have Ph.D. degrees. The added amount in such cases represented administrative responsibility.

allocated to education and specialization for each male was computed according to the above scale and totaled separately for the Specialist Staff and Field Staff. Those totals were then subtracted from the total salaries paid to the respective staffs. The remainders were considered to represent that portion of the total salaries attributable to experience and merit.

"The committee then developed a formula to express the average value of experience and merit for each of the staffs. The committee assigned three points for each year of direct experience and one and one-half points for each year of related experience. The number of experience points for each male was calculated and totaled separately for each staff. The committee then divided the separate experience points of each staff by the respective total of the average individual annual performance ratings (merit)[3] which were based on a one-to-five scale with one indicating the highest level of achievement. The quotient gave the total "experience rating points" for the two staffs. The remainders representing the portion of salary attributed to experience and merit were then divided by the respective totals of the "experience rating points" which resulted in allocating $120.00 for each "experience point" of a member of the Field Staff and $106.00 for each "experience rating point" of a member of the Specialist Staff.

"The committee was then in a position to set forth a formula by which it could compare an actual individual

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3 The individual annual performance rating is a consensus of the ratings made by a professional employer's immediate supervisor. The annual performance ratings are kept on file by the University personnel office.

female salary with a hypothetical average male salary based only on education, specialization, experience and merit. The formula can be expressed as follows:

Field Staff

$$A+B+\left[\frac{(3\times C+1.5\times D)}{E}\times \$120.00\right] = \text{Salary}$$

Specialist Staff

$$A+B+\left[\frac{(3\times C+1.5\times D)}{E}\times \$106.00\right] = \text{Salary}$$

A=Education; B=Specialization; C=Years of Direct Experience; D=Years of Related Experience; E=Merit (individual annual performance rating.)

"The committee performed the calculations for each of the one hundred twenty-five females and determined that thirty-three of the female employees were receiving less than the formula salary. The difference between formula and actual salary was considered the amount necessary to equalize male and female salaries.[4]

"The committee completed its work in April of 1972. The University, then faced with the problem of what to do with the committee's findings in budgeting salaries for the fiscal year beginning on July 1, 1972, decided to implement the committee's findings. Accordingly, effective July 1, the salaries of the thirty-three females were increased to the formula level. This "equalization" raise was to be effected prior to any other salary increases. The female professionals also received a $300.00 increase

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4 All of the committee's calculations were based on the 1971-1972 fiscal year salaries.

which had been mandated for male and female professionals by the legislature.

"This process had a twofold effect: It established an "average"[5] male formula salary as the minimum salary for females and it left a number of males receiving less than the formula salary. In fact, of the two hundred seventy-two males whose salaries were used as the base, ninety-two of them received less than the formula.[6] It is these males who contend that the University has violated the Equal Pay Act by not applying the formula to them.

"A resolution of this case depends upon a proper application of the Equal Pay Act. 29 U. S. C. § 206 (d) (1)[7] provides:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, ex-

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5 We use the term "average" guardedly since it is not the true average of the males but rather a weighted average. The education attainment and specialization factors distort the "average."

6 In the trial court's memorandum, it is stated that eighty-five males received less than the formula salary. This is apparently a typographical error. The correct figure is ninety-two.

7 Congress amended the Fair Labor Standards Act, 29 U. S. C. § 213 (a), effective July 1, 1972, so as to eliminate the exemption provision which had provided that the sex discrimination provision of the Equal Pay Act, 29 U. S. C. § 206 (d) (1) would not apply to professional employees.

cept where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex; *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

"The University contends that the male employees of the class have failed to establish by a preponderance of the evidence, that the female employees were compensated at a different rate, that they were employed in the same establishment, and that they were engaged in jobs, the performance of which required equal skill, effort and responsibility. It further argues that the thirty-three female professionals received a one-time salary adjustment and that henceforth it will return to its traditional method of salary determination — individual negotiation considering education, experience, special skill, merit and market conditions (supply and demand). Thus, the University contends that there was no violation of the Act.[8]

"In our view, the defendant class has carried its burden of proof and has established that the members of the class were unlawfully discriminated against.[9] They proved

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8 We note that the evidence as to the existence of sex discrimination at the University of Nebraska prior to these events is conflicting. Dr. Virginia Trotter, former Dean of the College of Home Economics, contended at the trial that the committee had found discrimination. Dr. John Adams, Director of the Cooperative Extension Service and chairman of the committee, indicated that there has been no discrimination against females.

9 We agree with the University that the burden of proof rested on the defendant class even though the University had initiated the declaratory judgment action. Reliance Life Insurance Co. v. Burgess, 112 F. 2d 234 (8th Cir. 1940).

that the University had established a minimum salary schedule for all presently employed female professionals in the Colleges of Agriculture and Home Economics and that at least thirty-three of that group were placed on that schedule. They further proved that at least ninety-two male professionals (having substantially equivalent education, experience and merit) were retained by the two colleges at a wage less than the minimum established for the females. This proof was sufficient to establish a violation of the Equal Pay Act." App. 2-App. 8.

REASONS FOR DENYING THE WRIT

1. The decision below accurately applies the provisions of the Equal Pay Act of 1963, 29 U. S. C. § 206(d)(1) to the facts of this case.

The University contends the Court of Appeals for the Eighth Circuit failed to adequately consider the "equal work" requirement of the Equal Pay Act of 1963. Such a contention is answered by the opinion of the Court of Appeals and is counter to the prevailing case law and the legislative history of the Act.

The University developed its own criteria for the purpose of determining whether women employees within the College of Agriculture and Home Economics were being discriminated against. The selected indices of experience, education, merit ratings and years of experience are objective and relate to all compared employees. The fact that the University found "average" male rates of com-

pensation based on the above indices and then applied them to female employees, demonstrates that the University considered the two groups to be "substantially equal" so far as work was concerned. It is vital to note that the University did not make a person by person, job by job, analysis, but rather applied the men's average salary rates to each female, raised the pay of those females falling below the average rates, but did not raise the pay of males falling below the average rates.

As the Court of Appeals for the Eighth Circuit correctly stated:

> "It was the University, not the defendant class, that established the ground rules for determining whether women were being discriminated against. It determined the factors that were considered to be important for that purpose. It cannot now be heard to complain that some other additional factors must also be considered when the question is one of discrimination against male employees who are being paid less than the formula minimum." App. 8.

The University while recognizing that "substantially equal" is the criteria under the Equal Pay Act of 1963, states that this does not mean "mere comparability." Rather, the University alleges that only differences in job performances which are inconsequential can be disregarded under the "equal work" standard. The prevailing case law, legislative history, and common sense all dictate to the contrary.

In essence, the University seeks to exploit a recognized difficulty with the "equal work" requirement. As this Court has stated:

> "The most notable feature of the history of the Equal Pay Act is that Congress recognized early in the legislative process that the concept of equal pay for equal work was more readily stated in principle than reduced to statutory language which would be meaningful to employers and workable across the broad range of industries covered by the Act." *Corning Glass Works v. Brennan*, 417 U. S. 188, 198-99 (1974).

The words "equal work" are sufficiently interpreted by reference to the legislative history of the act which states:

> "It is important to note that in setting standards as to what constitutes equal work, the bill provides that seniority systems, merit systems, systems based upon quantity or quality or production or any other differential based on *factors other than sex*, may be taken into consideration." Remarks of Congressman Goodell, 109 Cong. Rec. 9202 (1963). (Emphasis added.)

In this case, the University chose the standards of comparison between the male and female employees, developed a salary formula applicable to employees without regard to sex, and then applied the resultant formula to women only.

It cannot reasonably be argued that the compared employees did not perform "substantially equal" work.

2. The respondent fails to see how the decision of the Court of Appeals as argued by petitioner frustrates in any way the purpose of the Equal Pay Act of 1963 and the Civil Rights Act of 1964.

"The Equal Pay Act is broadly remedial . . ." *Corning Glass Works v. Brennan*, 417 U. S. at 208. The Act prohibits wage differentials where, as here, the differen-

tial is based only upon the sex of the employee. Admittedly, the Act was designed to strike at the problem of historic pay discrimination against women. It is not reasonable to assert, however, that the Act is applicable only to women. Clearly the Act is sexless in its applicability.

Employers will be encouraged to purge sex-based salary discrimination because of the decision in this case by the Court of Appeals. The simple lesson to be learned is that if a sexless salary formula is to be used, it must be fairly and non-discriminatorily applied without regard to sex. The employer simply cannot, after developing a salary formula, allow employees to receive less pay solely because of their sex.

Equality does not mean giving to one person or group of persons at the expense of a second person or group. Rather, the less-than-equal person must be lifted to stand in the same position as the other person and not be placed ahead. Had the University simply applied the formula to all employees without regard to sex, this case would not have arisen.

The simple, hard and undenied fact is that if A. Neil Dawes had been a woman, he would have received more pay for the year commencing July 1, 1972. The Court of Appeals for the Eighth Circuit recognized this fact and has correctly ordered that the University correct its error.

Undoubtedly a question exists in the mind of the reader: Why didn't the University administration simply adjust men's salaries up to the formula rate when they fell below it?

A. Neil Dawes, chairman of the male employees' committee, wrote to the Chancellor of the University on Aug-

ust 17, 1972, asking why the recommendation to increase male salaries was not adopted. The Chancellor replied to Mr. Dawes under date of September 20, 1972 (defendant's Exhibit 16—Transcript 123) with the following interesting paragraph:

> "The main reason that my office could not respond affirmatively to the recommendation of Dean Frolik concerning this matter was the lack of funds in our 1972-73 budget. I am fully aware that work still remains to be done in the area of salary equalization in the College of Agriculture and elsewhere at the University of Nebraska—Lincoln, but until we get the necessary funding to implement the various recommendations, there is little that can be done about it. Hopefully, the day will come when we have full and complete salary equalization for both men and women within the entire University."

CONCLUSION

For the reasons set forth herein, the Respondent respectfully prays that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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Counsel for Petitioner

January 16, 1976

EXHIBIT A

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 75-1126

THE BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA,

Appellee,

vs.

A. NEIL DAWES,
and All Extension Employees at the University of Nebraska College of Agriculture Who are Similarly Situated

Appellants.

Appeal from the United States District Court for the District of Nebraska

Submitted: June 13, 1975

Filed: August 26, 1975

Before LAY, HEANEY and STEPHENSON, Circuit Judges.

HEANEY, Circuit Judge.

This action arises out of a suit for declaratory judgment brought by the Board of Regents of the University of Nebraska (University) seeking a determination of the rights and status of the parties under the Equal Pay Act of 1963, 29 U.S.C. §206(d)(1).[1] The essential issue is

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1 By order of the United States District Court, District of Nebraska, on agreement of the parties, the matter was designated a class action pursuant to Federal Rules of Civil Procedure 23 (a) and (b)

(Continued on next page)

whether the University unlawfully discriminated against the male professional employees of the College of Agriculture and Home Economics when it sought to equalize salaries paid to the male and female employees of those colleges. The University established and put into effect a formula for determining a minimum salary schedule based on education, experience and merit for females then employed by the colleges but refused to put into effect the same formula for determining the minimum salaries of males then employed. We hold that this constituted unlawful discrimination and reverse the District Court.

In the spring of 1972, the University became aware of the problems encountered by the University of Wisconsin when it was investigated and found in violation of the Civil Rights Act of 1964. The University of Wisconsin was found to have unlawfully discriminated against women in setting salaries when it underwent a compliance review conducted by the United States Department of Health, Education and Welfare. The University, to avoid similar problems, determined to undertake a review of its salary structure and make such adjustments as necessary to eliminate salary discrimination based on sex in order to avoid the possible loss of federal funds. Directives were sent through administrative channels until they reached the Deans of the Colleges of Agriculture and Home Economics. These colleges referred the matter to a joint committee for study.

(Continued from previous page)

(2). The defendant class counterclaimed and sought recovery for alleged unpaid wages, liquidated damages, interest and reasonable attorney fees. The University denied the class claim and pled the defense of sovereign immunity under the Eleventh Amendment. The trial court held that the defendant class had not proved a violation of the Act and hence found it unnecessary to determine the Eleventh Amendment issue.

The committee, after intensive study, concluded that they could best determine whether inequities existed through a three-step process: first, identify comparable jobs; second, examine the salaries of the males and identify and assign a monetary value to the factors which went into determining their salaries; and third, compare the average male salary with individual female salaries based on a formula developed through the first two steps of the process.

In identifying comparable jobs, the committee decided that exact one-to-one comparisons were impractical. They determined that they could classify the employees according to whether they were Academic Research and Extension Specialist Staff or Extension Field Staff; *i. e.*, Specialist Staff or Field Staff.

In the second step, the committee determined that education, specialization, years of direct and related experience and merit were the factors which logically determined a male professional's salary. In order to assign a monetary value to these factors, the committee made a determination that Doctors of Philosophy with no experience were being hired at $14,000. Of that $14,000, $8,000 represented the value of a Bachelor's degree, $2,000 represented the value of a Master's degree, $3,000 represented the value of a Doctor's degree and $1,000 represented the value of specialization.[2] The portion of salary

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2 All Ph.D.'s were credited with $1,000 for specialization. The committee also credited personnel holding the position of County Agent Chairmen in the Field Extension Staff category with $1,000 for specialization although such personnel did not have Ph.D. degrees. The added amount in such cases represented administrative responsibility.

allocated to education and specialization for each male was computed according to the above scale and totaled separately for the Specialist Staff and Field Staff. Those totals were then subtracted from the total salaries paid to the respective staffs. The remainders were considered to represent that portion of the total salaries attributable to experience and merit.

The committee then developed a formula to express the average value of experience and merit for each of the staffs. The committee assigned three points for each year of direct experience and one and one-half points for each year of related experience. The number of experience points for each male was calculated and totaled separately for each staff. The committee then divided the separate experience points of each staff by the respective total of the average individual annual performance ratings (merit)[3] which were based on a one-to-five scale with one indicating the highest level of achievement. The quotient gave the total "experience rating points" for the two staffs. The remainders representing the portion of salary attributed to experience and merit were then divided by the respective totals of the "experience rating points" which resulted in allocating $120.00 for each "experience point" of a member of the Field Staff and $106.00 for each "experience rating point" of a member of the Specialist Staff.

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3 The individual annual performance rating is a consensus of the ratings made by a professional employer's immediate supervisor. The annual performance ratings are kept on file by the University personnel office.

The committee was then in a position to set forth a formula by which it could compare an actual individual female salary with a hypothetical average male salary based only on education, specialization, experience and merit. The formula can be expressed as follows:

Field Staff

$$A+B+\left[\frac{(3\times C+1.5\times D)}{E}\times \$120.00\right] = \text{Salary}$$

Specialist Staff

$$A+B+\left[\frac{(3\times C+1.5\times D)}{E}\times \$106.00\right] = \text{Salary}$$

A=Education; B=Specialization; C=Years of Direct Experience; D=Years of Related Experience; E=Merit (individual annual performance rating).

The committee performed the calculations for each of the one hundred twenty-five females and determined that thirty-three of the female employees were receiving less than the formula salary. The difference between formula and actual salary was considered the amount necessary to equalize male and female salaries.[4]

The committee completed its work in April of 1972. The University, then faced with the problem of what to do with the committee's findings in budgeting salaries for the fiscal year beginning on July 1, 1972, decided to implement the committee's findings. Accordingly effective July 1, the salaries of the thirty-three females were

4 All of the committee's calculations were based on the 1971-1972 fiscal year salaries.

increased to the formula level. This "equalization" raise was to be effected prior to any other salary increases. The female professionals also received a $300.00 increase which had been mandated for male and female professionals by the legislature.

This process had a twofold effect: It established an "average"[5] male formula salary as the minimum salary for females and it left a number of males receiving less than the formula salary. In fact, of the two hundred seventy-two males whose salaries were used as the base, ninety-two of them received less than the formula.[6] It is these males who contend that the University has violated the Equal Pay Act by not applying the formula to them.

A resolution of this case depends upon a proper application of the Equal Pay Act. 29 U.S.C. §206(d)(1) provides:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a

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5 We use the term "average" guardedly since it is not the true average of the males but rather a weighted average. The education attainment and specialization factors distort the "average."

6 In the trial court's memorandum, it is stated that eighty-five males received less than the formula salary. This is apparently a typographical error. The correct figure is ninety-two.

seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection reduce the wage rate of any employee.

The University contends that the male employees of the class have failed to establish by a preponderance of the evidence, that the female employees were compensated at a different rate, that they were employed in the same establishment, and that they were engaged in jobs, the performance of which required equal skill, effort and responsibility. It further argues that the thirty-three female professionals received a one-time salary adjustment and that henceforth it will return to its traditional method of salary determination—individual negotiation considering education, experience, special skill, merit and market conditions (supply and demand). Thus, the University contends that there was no violation of the Act.[8]

In our view, the defendant class has carried its burden of proof and has established that the members of the

---

7 Congress amended the Fair Labor Standards Act, 29 U. S. C. §213 (a), effective July 1, 1972, so as to eliminate the exemption provision which had provided that the sex discrimination provision of the Equal Pay Act, 29 U. S. C. § 206 (d) (1) would not apply to professional employees.

8 We note that the evidence as to the existence of sex discrimination at the University of Nebraska prior to these events is conflicting. Dr. Virginia Trotter, former Dean of the College of Home Economics, contended at the trial that the committee had found discrimination. Dr. John Adams, Director of the Cooperative Extension Service and chairman of the committee, indicated that there has been no discrimination against females.

class were unlawfully discriminated against.[9] They proved that the University had established a minimum salary schedule for all presently employed female professionals in the Colleges of Agriculture ad Home Economics and that at least thirty-three of that group were placed on that schedule. They further proved that at least ninety-two male professionals (having substantially equivalent education, experience and merit) were retained by the two colleges at a wage less than the minimum esablished for the females. This proof was sufficient to establish a violation of the Equal Pay Act.

It was the University, not the defendant class, that established the ground rules for determining whether women were being discriminated against. It determined the factors that were considered to be important for that purpose. It cannot now be heard to complain that some other additional factors must also be considered when the question is one of discrimination against the male employees who are being paid less than the formula minimum.

The University asserts that the "glaring fallacy" in the approach of the defendant class is that the formula does not represent the actual compensation paid to either male or female employees. It is in error in this assertion. On July 1, 1972, thirty-three women were placed on a step of the "salary schedule" consistent with their education, experience and merit rating solely because they were

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9 We agree with the University that the burden of proof rested on the defendant class even though the University had initiated the declaratory judgment action. Reliance Life Insurance Co. v. Burgess, 112 F. 2d 234 (8th Cir. 1940).

women and for no other reason—not because they had more administrative duties, taught more difficult subjects or worked harder and not because they were better teachers, researchers or field agents.[10]

It is of course, true that there were and are male and female teachers who receive salaries in excess of those obtained by applying the formula. It may even be that a careful comparison of these professionals would uncover inequities as between the sexes, but we are not concerned with that problem on this appeal. It is not necessary to prove that all of the persons of one sex employed by a single employer are discriminated against to establish a violation of the law. It is sufficient to show that some are.

We, of course, do not hold or imply that a University must establish salary schedules or even minimum salaries.

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10 The trial court found that on July 1, 1972, the average male was paid $1,337 per year above the formula and that the average female was paid only $744.00 above the formula. It concluded from these averages that there was no violation of the Equal Pay Act with respect to the men. The averages, if correct, would be largely irrelevant since all the females were paid at least the minimum set in the formula and ninety-two men who performed substantially equal work received less than that minimum.

We also doubt the correctiveness of the averages. It appears that the average should be:

$$\frac{\$333,724 - \$85,000}{272} = \$914.00$$

moreover, the average male salary was apparently computed to include the $300.00 legislatively-mandated increase while the average female salary was apparently computed without the increase.

We simply hold that when a University establishes and effectuates a formula for determining a minimum salary schedule for one sex and bases the formula on specific criteria such as education, specialization, experience and merit, it is a violation of the Equal Pay Act to refuse to pay employees of the opposite sex the minimum required under the formula.

In the light of our decision, the other points raised at the University are without merit and need no discussion. We express no opinion as to the merits of the University's Eleventh Amendment defense as the trial court did not rule on the issue. The decision of the District Court is reversed and the case is remanded for action consistent with this opinion.

A true copy.

Attest:

/s/Robert C. Tucker

U. S. Court of Appeals,
Eighth Circuit.

EXHIBIT B

(Filed January 2, 1975)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV73-L 190

THE BOARD OF REGENTS OF THE
UNIVERSITY OF NEBRASKA,
Plaintiff,

vs.

A. NEIL DAWES,
and All Extension Employees in the University of
Nebraska College of Agriculture who
are similarly situated,
Defendants.

JUDGMENT

Pursuant to the Order for Judgment entered in the above entitled matter,

IT IS ADJUDGED AND DECREED that the University of Nebraska's July 1, 1972 salary adjustments accorded certain women employees of the Nebraska Colleges of Agriculture and Home Economics did not violate defendants' 29 U. S. C. § 206(d)(1) rights.

IT IS FURTHER ADJUDGED AND DECREED that the defendants' counterclaim be dismissed.

Dated this 31st day of December, 1974.

/s/ PAUL BENSON
PAUL BENSON
United States District Judge

(Filed January 2, 1975)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV 73L-190

THE BOARD OF REGENTS OF THE
UNIVERSITY OF NEBRASKA,

Plaintiffs.

vs.

A. NEIL DAWES,
and All Extension Employees in the University of
Nebraska College of Agriculture who
are similarly situated,

Defendants.

MEMORANDUM OF DECISION
AND ORDER

NATURE OF THE CASE AND JURISDICTION

This action was brought as a declaratory judgment action under 28 U. S. C. § 2201 and § 2202. The Court has jurisdiction under 28 U. S. C. § 1337, as the action arose out of rights claimed under 29 U. S. C. § 206(d)(1). By order of the Court, on agreement of the parties, the matter was designated a class action pursuant to Rule 23(a) and Rule 23(b)(2), Federal Rules of Civil Procedure. Plaintiff is asking declaratory judgment as to the rights and status of the parties under the Equal Pay Provision of the Fair Labor Standards Act. Defendant class counterclaimed, and is seeking recovery for alleged unpaid wages, liquidated damages, interest, and reasonable attorney fees. In its reply to the counterclaim, plaintiff denies defendants' claim for monetary relief, and further

pleads the defense of sovereign immunity under the Eleventh Amendment to the Constitution of the United States.

FINDINGS OF FACT

The Court finds the facts as follows:

In the Spring of 1972, the University of Nebraska initiated a review of the salary structure for female academic and administrative employees in each of its various colleges. This review was motivated by the University's desire to comply with the Civil Rights Act of 1964, as amended and applied to Governmental Contractors via Executive Order No. 11246, and the attendant regulations promulgated thereunder, all of which do not allow discrimination in compensation based on sex. Compliance with the law would avoid potential imposition of governmental sanctions which might include the loss of federal funds.

The President of the University of Nebraska referred the matter to the President's Council to study, evaluate and eliminate any existing discrimination. Upon recommendation by the Council, a proposed evaluation and equalization program for women was implemented on March 24, 1972. A memorandum was sent to the Chancellor of each of the University of Nebraska System's three campuses, which directed each to proceed with the equalization of female employees' compensation with that of men and to attempt to adjust over a three year period, any existing disparities based on sex.

Chancellor James H. Zumbarge of the University of Nebraska — Lincoln campus responded on March 29, 1972,

by directing each of his deans to proceed with salary equalization, which included the College of Agriculture under Dean E. F. Frolik, and Home Economics under Dr. Virginia Trotter.

Attached to the directive was a memorandum from Vice President Howard Neville explaining that the President's Council has adopted a recommended plan of action aimed at discovering and systematically eliminating salary inequities between men and women in comparable positions. The College of Agriculture was directed to proceed to make a review of salaries under a set of general guidelines contained in the memorandum.

At the time the equalization process was instituted and during the time the plan was promulgated, the specific objective of the Colleges of Agriculture and Home Economics was to identify and eliminate any discrimination in compensation against women based on their sex. The Colleges were not charged or authorized to develop a uniform salary schedule as to all employees or to make any adjustments other than those necessary to eliminate sex discrimination. The basic approach was to compare average women's salaries with average men's salaries in comparative "job" groups. The "job" groups were based on University of Nebraska title code assignments and in the case of faculty groups, type of appointment was given consideration.

Consideration was also to be given to qualifications for specific positions. The end result would be a comparison of the average salaries of men and women with comparable qualifications in each "job" group. If the

average salary for women was less than the average salary for men, then a deficiency existed and a worksheet was to be completed. If the average salary was equal to or larger than the average salary for men, then no deficiency existed in women's salaries, and the evaluation was complete.

The Council realized that a considerable amount of subjective judgment would be required for the evaluation, but cautioned the colleges to avoid extremely precise comparative group distinctions, and to subject the final group definitions to a reasonable test.

At the time this task was undertaken, the University of Nebraska College of Agriculture and College of Home Economics had approximately 516 academic-administrative and managerial-professional employees who were appointed under eight different basic types of appointments, ranging from 12 month appointments to appointments as visiting personnel; they had varying educational backgrounds, varying experience and held a widely divergent range of job positions.[1]

1

12 month	456
Academic year	25
Other	2
One-year special contract	4
12 month part-time	15
Academic year part-time	9
Other part-time	3
Visiting	2
	516

Of the total employees, 35 were administrative, 23 were department chairmen, 24 were assigned to a separate facility at Curtis, Nebraska, 3 were trainees, 1 person was paid entirely from sources other than the University of Nebraska, 1 was on special contract and 124 were women.

No established method or formula for determining compensation for academic-administrative or managerial-professional employees had ever been implemented by either college, or by the University of Nebraska as a whole. Starting salaries for the College of Agriculture and the College of Home Economics had always been determined by the College Administration subject to approval by the Campus Chancellor and the approval by the Board of Regents. Starting salaries for a given position were based on such factors as education, special skill, experience and were primarily influenced by market conditions relative to supply and demand for persons in the particular specialty desired. Annual increases in both colleges had been based largely on merit with consideration again being given to longevity, faculty rank, and legislative directives from the Nebraska State Legislature accompanying University appropriations. These determinations were, like starting salary, also influenced by the market conditions for a given specialty. Because of the historical compensation practice, salaries varied widely from college to college within given departments and even within various positions.

In the process of carrying out the task of equalization, the persons charged with the responsibility in the Colleges of Agriculture and Home Economics were faced with a two-fold inquiry.[2] First, it was necessary to de-

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2 In attempting to identify and correct existing salary discrimination against women based on sex, Dr. Charles Adams, Acting Dean of the College of Agriculture, worked in cooperation with Dr. Virginia Trotter, Dean of the College of Home Economics and Associate Director of both the Agriculture Extension Service and the Experiment Station, Dr. Franklin Eldridge, Director of Resident Instruction for the College of Agriculture, Dr. Robert Kleis, Acting Director of the Experiment Station, and Mr. Charles Koopmann, Finance Officer of the College of Agriculture.

velop a method by which the extent of the existing discrimination against women, if any, might be determined, and secondly, it was necessary to provide some basis on which discrimination, if it was determined to exist, might be eliminated. It was not the intention of the Systems Administration, nor the Campus or College Administration, to attempt to abandon the past pay practices. None of the persons involved in the equalization process ever sought nor were they authorized to develop a single salary schedule which was to be uniformly applied to all academic-administrative or managerial-professional employees. In fact, they sought only to develop a means by which existing discrimination in the compensation of women might be discovered and eliminated. The adjustments once determined were to be made in the form of a one-time increase within the context of the pre-existing pay practice which would then continue as it had in the past albeit with a heightened emphasis on the prevention of any further discrimination based on sex.

In implementing the equalization program, it was determined that discrimination did exist. The Committee began a series of different analytical approaches to attempt to determine the extent of discrimination and a suitable system of salary adjustment. As a result of their deliberations, they finally developed a formula based on average male compensation. The formula which was derived attempted to assign relative values for education, specialization, experience and evaluated performance.

In its final form, the formula approach really encompassed two separate formulas. One was calculated for

all academic-research and extension specialist staff[3] and another formula was developed for extension field staff. Each formula was based on the compensation received by male employees in the respective job category during the 1971-72 fiscal year, including positions of County Agent-Home Economics, County Agent-Agriculture, and County Agent Chairman.

Having settled on this approach to salary equalization, the group comprised of Doctors Trotter, Adams, Klies, and Eldridge, with the assistance of Mr. Koopmann, then applied the appropriate formula to individual women employed in the respective positions. Each woman's compensation, calculated according to the appropriate formula was then compared to the amount which she had received for the 1971-72 fiscal year. The deficiency in compensation of each woman, if any, was then determined, and where necessary, an appropriate adjustment was made for equalization purposes. These adjustments

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3 Field Staff

$$\frac{8{,}000 \text{ (Bachelor degree)} + 1{,}000 \text{ for specialization} + 2{,}000 \text{ for M. S. degree} + 3{,}000 \text{ for Doctors degree}}{\left[\begin{array}{l}(3 \times \text{No. of years of University Service or equivalent service}) + (1\tfrac{1}{2} \times \text{No. of years of similar experience}) \times 120\end{array}\right]}$$

average rating

Other

$$\frac{8{,}000 \text{ (Bachelor degree)} + 1{,}000 \text{ for specialization} + 2{,}000 \text{ for M. S. degree} + 3{,}000 \text{ for Doctors degree}}{\left[\begin{array}{l}(3 \times \text{No. of years of University Service or equivalent service}) + (1\tfrac{1}{2} \times \text{No. of years of similar experience}) \times 106\end{array}\right]}$$

average rating

were then set forth on a separate worksheet headed, "The U of N - Worksheet for Reporting Inequities in Women's Salaries", as directed by Vice President Neville's memorandum.

By applying the formulas, the Colleges' Administrators sought to pinpoint those cases in which discrimination existed for female employees in the College of Agriculture and College of Home Economics, and measure the amount of increase necessary to eliminate that discrimination. No adjustment was made for women whose 1971-72 compensation was equal to or in excess of the appropriate formula compensation, and the formula was not applied, nor any adjustment made, for male or female employees in the following classifications:

1. Administrative
2. UNSTA—Curtis
3. Trainees
4. Persons paid from other sources
5. Persons on special contracts

As part of the regular budgetary process, the formula adjustments for women, together with general salary increase recommendations for the 1972-73 year, were forwarded to the Lincoln Campus Administration for their approval.

The formula was not used to determine the general increases of either men or women for the 1972-73 fiscal year, nor is it to be used as a method or formula or rate to determine future compensation for University employ-

ees. It was used as a one time only adjustment for a limited group of women employees.

In accord with the University of Nebraska budgetary system, equalization increases were approved and became effective for the fiscal year 1972-73 at its commencement on July 1, 1972. On that date there were approximately 391 males and 125 females employed by the College of Agriculture and College of Home Economics. There were 85 male employees whose 1972-73 compensation was below the formula by an aggregate amount of $85,000. In addition, there were approximately 180 men whose compensation exceeded the formula computation by an aggregate amount of $333,724[4] and 125 women whose compensation exceeded the formula rate by an aggregate amount of $93,048, and there were no female employees of the Colleges who were compensated at a level below the appropriate formula computation. Based on these figures, as of July 1, 1972, on the average, men were compensated at an average rate of $1337.09 above formula, while women were compensated at an average rate of $744.38 above formula. Further calculations show that following the formula adjustments, the average women's salaries were comparable to slightly below those of men's salaries.

In the process of making the formula adjustment for women in April of 1972, no adjustment was made for any of the employees located at the Experiment Station located in Curtis. In addition, no formula adjustment was

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4 The number of 180 men excludes persons in the following categories: administrative, UNSTA Curtis, trainees, retired persons, employees paid from other sources, persons on special contract, and persons who resigned.

made for any College of Agriculture Administrative employees, or for persons paid from other sources, and no formula adjustments were granted to any employees located at either the Boyd or Sherman County Experiment Stations.

The plaintiff is an employer within the definition of 29 U. S. C. § 203(d), and A. Neil Dawes and the class he represents are employees of the plaintiff, within the meaning of 29 U. S. C. § 203(e).[5]

A justiciable controversy arose when the 85 male employees, whose 1972-73 compensation was less than it would have been had the formula been made applicable

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5 29 U. S. C. § 203 as used in this chapter provides:

"(d) 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State (except with respect to employees of a State, or a political subdivision thereof, employed (1) in a hospital, institution, or school referred to in the last sentence of subsection (r) of this section, or (2) in the operation of a railway or carrier referred to in such sentence), or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) 'Employee' includes any individual employed by an employer, except that such term shall not, for the purposes of subsection (u) of this section include—

(1) any individual employed by an employer engaged in agriculture if such individual is the parent, spouse, child, or other member of the employer's immediate family, or

(2) any individual who is employed by an employer engaged in agriculture if such individual (A) is employed as a hand harvest laborer and is paid on a piece rate basis in the region of employment, (B) commutes daily from his permanent residence to the farm on which he is so employed, and (C) has been employed in agriculture less than thirteen weeks during the preceding calendar year."

to them, made a demand on the University for additional compensation based on alleged violation of 29 U. S. C. § 206(d)(1). The alleged violation is based on the act of the University in applying the formula to women and not to men.

BURDEN OF PROOF

Initially, a determination must be made as to where the burden of proof rests in this case. It is the position of the plaintiff that its declaratory judgment action is an attempt to "expedite and simplify the ascertainment of the uncertain rights of the parties" and that the defendants, by counterclaiming for unpaid wages, liquidated damages, interest and attorney fees, have the same burden of proof that the Secretary of Labor or a private employer would have if the claim of the class defendants had been instituted by them under 29 U. S. C. § 206.

It is plaintiff's position that the differential in pay to women is justified because the positions filled by the various personnel at the University of Nebraska College of Agriculture are jobs which do not require "equal skill, effort and responsibility, and which are performed under similar working conditions", and that the differential is based on a factor *other* than sex.

On the other hand, the defendant argues that a wage differential did exist and that it existed between employees of the opposite sex within the same establishment, and it existed with respect to employees who held jobs, the performance of which required equal skill, effort and responsibility and which were performed under similar working conditions. It is undisputed that had the Secretary of Labor, or a private employee, instituted this

§ 206(d)(1) action under 29 U. S. C. § 204, the plaintiff would have the burden to prove by a preponderance of the evidence that those facts existed. Only after claimants' facts established a prima facie claim, would the burden of proof have shifted to the employer to demonstrate that the discriminatory differential, if established, was based on factors other than the sex of the employees. *Brennan v. Corning Glass Works,* 480 F. 2d 1254, 1258 (3rd Cir. 1973); *Hodgson v. Corning Glass Works,* 474 F. 2d 226, 231 (2nd Cir. 1973); *Schultz v. American Can Co.,* 424 F. 2d 356, 360 (8th Cir. 1970); *Hodgson v. Brookhaven General Hosp.,* 436 F. 2d 719, 722 (5th Cir. 1970). This burden is not placed on the plaintiff merely because it initiates the action. It is carried by the party seeking relief through the Fair Labor Standards Act.

In *Reliance Life Insurance Co. v. Burgess,* 112 F. 2d 234, 237, 238 (8th Cir. 1940), *cert. den.* 311 U. S. 699, *rehearing denied* 311 U. S. 730 (1940),[6] the Court had an opportunity to review the issue of where the burden of proof lies in a declaratory judgment action. There, an insurer had initiated an action for a declaration of nonliability under a double indemnity clause because of suicide. At the beginning of the trial, and in its instruction to the jury, the trial court ruled that the burden of proof was on the plaintiff, and the plaintiff excepted to these rulings. On appeal, the Eighth Circuit noted that:

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6 See also Royal Indemnity Corp. v. Wingate, 353 F. Supp. 1002 (D. Md. 1973); Sims v. Amos, 365 F. Supp. 215, 220, n 1 (D. Ala. 1973); Deere & Co. v. Sperry Rand Corp., 322 F. Supp. 397, 398 (D. Cal. 1970); Phillip A. Hunt Co. v. Mallenckrodt Chem. Works, 72 F. Supp 865, 873-74 (D. N. Y. 1947); Preferred Acc. Ins. Co. of New York v. Grasso, 186 F. 2d 987, 991 (2nd Cir. 1951).

"The question as to who must sustain the burden of proof in a declaratory judgment suit is a comparatively new one, which we think does not admit of a categorical answer. It must depend, as in other cases of litigation, upon the condition of the pleadings and the character of the issues at the time the question is presented. Plaintiff alleged that the insured committed suicide while sane. It alleged an actual controversy, and the proceeding was instituted by it to determine that controversy. Defendant denied that a justiciable controversy existed and put in issue the allegations of plaintiff's petition, but they asked no affirmative relief but prayed only to be discharged with their costs. The question as to whether or not the burden of proof in its primary sense rests upon the plaintiff or defendant is ordinarily to be determined by ascertaining from the pleadings which of the parties without evidence would be compelled to submit to an adverse judgment before the introduction of any evidence. It is a fundamental rule that the burden of proof in its primary sense rests upon the party who, as determined by the pleadings, asserts the affirmative of an issue and it remains there until the termination of the action. It is generally upon the party who will be defeated if no evidence relating to the issue is given on either side.

. . .

"The Declaratory Judgment Act, 28 U. S. C. A. 400, 'did not create any new substantive right. It is procedural in nature, designed to expedite and simplify ascertainment of uncertain rights; and it should be liberally construed to attain that objective.' Ohio Casualty Co. v. Marr, 10th Cir., 98 F. 2d 973, 975. During the course of the trial, defendants offered evidence in support of their right to recover on the policies. When they thus became the actors, the burden of proof in its secondary sense—the obligation of going forward with the evidence—shifted to them,

> and they were obliged to meet with evidence the prima facie case created against them. In this sense the burden shifted from time to time as the trial progressed and the evidence was introduced by the respective parties. . . ." *Id,* at 237-238.

Writing in concurrence, Judge Sanborn expressed his view on the issue as follows:

> "My opinion is that the burden of proving the existence of the controversy was on the plaintiff, but that the burden of proving the fact upon which the defendants relied for the establishment of their right of recovery was upon them. I think it would be safe to say that when an actual controversy is presented to a court for adjudication through the medium of a suit for a declaratory judgment, the burden of proving, by a fair preponderance of the evidence, the existence of the fact or facts upon which the rights and liabilities of the parties depend is upon him who has the affirmative of the issue which forms the basis of controversy, without regard to whether he is plaintiff or defendant in the suit. . . ." *Id* at 240-241.

In this case, the burden is on the plaintiff to go forward with the evidence and prove the facts which caused a justiciable controversy to arise. The burden is on the class defendant to prove salary differential between the sexes in an integrated establishment among employees performing work of equal skill, effort and responsibility under similar working conditions. The burden would then shift to the plaintiff to prove that the differential was based on a factor other than sex.

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CONCLUSION

The Court concludes that the defendant has failed to carry its burden, and the plaintiff is entitled to the judgment of this Court declaring that the University of Nebraska's July 1, 1972, salary adjustment accorded certain women employees of the University of Nebraska Colleges of Agriculture and Home Economics did not violate defendants' 29 U. S. C. § 206(d)(1) rights.

RATIONALE

The equal pay provisions of the Fair Labor Standards Act, 29 U. S. C. § 206(d)(1) provides:

> "No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex; *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee."

Section 213 of the Act initially exempted employees employed in executive, administrative or professional ca-

pacities from the provisions of § 206. Class defendants and the women who received the adjustment came within this exemption. Effective July 1, 1972, the same date the adjustment became effective, the exemption was removed.

The parties' briefs and arguments to the Court have centered on the matter of the salary adjustment that was extended to certain women employees of the University of Nebraska College of Agriculture and Home Economics, effective July 1, 1972, and whether the failure to apply to the men in the defendant class the same formula used in arriving at the salary adjustment for the women was a violation of § 206(d)(1). This approach to the litigation caused the parties to give exhaustive consideration to the issues of whether the men and women employees were engaged in jobs which required equal skill, effort and responsibility, performed under similar working conditions; whether the application of the formula to women only resulted in a differential; and whether the differential, if any, was a sex based discrimination, or based on a factor other than sex.

Without deciding the point, the Court will assume that the women employees who received the July 1, 1972, adjustment and the men who were members of the defendant class on that date held positions in the University of Nebraska establishment which were substantially equal.

Commencing on July 1, 1972, those employees came under the provisions of § 206(d)(1). On that date, they were being paid unequal salaries, which inequality was the result of the many factors that went into the matter of compensation to be received by an individual employee.

One of these was special skill and experience possessed by the individual, and another was longevity with the institution. Those who joined the faculty at different times came in with different starting salaries, frequently dependent upon the supply and demand of the specialties involved and the educational achievements of the employee. Over the years variable increases were granted, depending upon availability of resources, economic conditions and merit. An additional factor affecting the salary to be paid some of the women employees effective July 1, 1972, was the formula adjustment, which resulted in this lawsuit. However, the adjustment was just one of the many composite factors that, taken together, resulted in the total compensation package that existed as to each of these women employees on the date they came under § 206. The formula is not a continuing formula, and there is no evidence the University has any established method or formula determining future compensation.

The thrust of § 206(d)(1) is to prohibit a differential based on sex. Under the assumption that the employees' positions were substantially equal, if such a differential existed, it would be a prohibited discrimination. A simple example of such discrimination would be the simultaneous hiring of a man and woman of equal qualifications to fill two identical positions in the same establishment, and paying one at a rate less than the other.

At the time the formula was devised and the decision made to apply it, the University, in its employer-employee relationships in the two colleges involved in this case, was not subject to § 206(d)(1). It was, however, subject to

the provisions of 42 U. S. C. §§ 2000(e) et seq., the Civil Rights Act of 1964,[7] which prohibited sex discrimination in wages, and the University was concerned with whether it was in compliance. The formula was devised and applied to cure past subtle discriminations against the women employees which the University determined had existed. The finding by the University that such discrimination existed is not subject to review here, because it is not relevant to the issue before the Court.

The issue here, as the Court conceives it, is whether under the plain wording of the statute, the defendant class men employees on July 1, 1972, were being paid compensation at a rate less than that being paid the women employees. The burden to establish the affirmative of that issue is on the defendant, and he has not carried it. The defendant has not endeavored to establish that on July 1, 1972, he and his class were being paid at an actual *rate* less than the rate paid to the women who received the adjustment. To recover, he must establish that fact as the Court views such proof as basic to defendants' cause of action on the counterclaim. Defendants proved that the individual members of the class would have received more pay than they are now receiving if the formula had been applied to them, but the Court will look only to the total pay received by the employees at the moment the

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7 "§ 2000-2. Unlawful employment practices—Employer practices. (a) It shall be unlawful employment practice for an employer: (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

colleges became subject to the act. Assuming substantially equal jobs, if there was an existing differential in actual pay received on July 1, 1972, the Court would then look to whether that differential was the result of a rate based on sex discrimination. The evidence established that on July 1, 1972, the average compensation of the male employees in the two colleges was $1,337.09 above the formula, and the average compensation of the women employees was $744.38 above the formula.

The formula, under the facts of this case, is not the equivalent of a rate. It was a one time only adjustment, which was made to cure a discrimination which the University found existed. As such, it was a one time increase limited to certain employees and did not otherwise effect the context of the historical pay practices of the University, which practices were to continue as in the past, with future increases to be determined on factors other than sex.

To summarize, in its disposition of this litigation, the Court has decided the case on a very narrow factual issue. Assuming that on July 1, 1972, members of the defendant class, and the women who received the adjustment, held substantially equal positions in the University of Nebraska establishment, was the defendant and his class being paid at a lesser discriminate rate than that received by the women? There is no proof before the Court that they were.

In view of the holding herein, consideration of the Eleventh Amendment issue is not necessary.

ORDER FOR JUDGMENT

IT IS ORDERED that judgment be entered declaring that the University of Nebraska's July 1, 1972, salary adjustments accorded certain women employees of the Nebraska Colleges of Agriculture and Home Economics did not violate defendants' 29 U. S. C. §206(d)(1) rights.

IT IS FURTHER ORDERED that the defendants' counterclaim be dismissed.

Dated this 31st day of December, 1974.

/s/ Paul Benson
PAUL BENSON
United States District Judge